

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GERALD A. ENGLER
Senior Assistant Attorney General
4 PEGGY S. RUFFRA
Supervising Deputy Attorney General
5 ARTHUR P. BEEVER
Deputy Attorney General
6 State Bar No. 242040
455 Golden Gate Avenue, Suite 11000
7 San Francisco, CA 94102-7004
Telephone: (415) 703-5865
8 Fax: (415) 703-1234
Attorneys for Respondent

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 **IDRIS NAWABI,**

14 Petitioner,

15 v.

16 **J. HARTELY, Warden,**

17 Respondent.

C 08-1258 WHA (PR)

**MOTION TO DISMISS HABEAS
CORPUS PETITION AS
UNTIMELY AND
PROCEDURALLY BARRED**

18
19
20 Respondent hereby moves to dismiss the petition for writ of habeas corpus as untimely
21 under 28 U.S.C. § 2244(d) and procedurally barred. A motion to dismiss in lieu of an answer on the
22 merits is proper where the petition is procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602
23 (9th Cir. 1989); *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C.
24 § 2254 Cases, Rule 4, and Advisory Committee Notes; *see also Jablon v. Dean Witter & Co.*, 614
25 F.2d 677, 682 (9th Cir. 1980) (motion to dismiss proper if time bar is clear from face of complaint).
26 We have not noticed a hearing date because petitioner is an incarcerated state prisoner who is
27 representing himself in this case.
28

1 **STATEMENT OF THE CASE**

2 On February 19, 1999, petitioner pleaded no contest to first degree robbery, sexual assault,
3 and sodomy by threat of retaliation. He also admitted personally using a deadly weapon, a knife,
4 during the robbery and sexual assault. Exh. 1, Reporter's Transcript ("RT") [2/19/99] 8-9; *see also*
5 RT [8/8/03] 2-3.

6 On April 2, 1999, the trial court sentenced petitioner to 19 years 4 months in prison,
7 consisting of the 8-year upper term for sexual assault, a consecutive 4 years for the use of a knife
8 during the assault, a consecutive 6 years for sodomy, a consecutive year for robbery, and a
9 consecutive 4 months for the use of a knife during the robbery. RT [4/2/99] 8-9. Petitioner did not
10 appeal.

11 On January 31, 2007, petitioner filed a petition for writ of habeas corpus in the Superior
12 Court of California, County of Alameda. Exh. 2 at 1. On March 28, 2007, the court denied
13 petitioner's habeas petition. Exh. 2.

14 On April 26, 2007, petitioner filed a petition for writ of habeas corpus in the California
15 Court of Appeal. Exh. 3. On May 10, 2007, the Court of Appeal denied petitioner's habeas petition.
16 Exh. 4.

17 On July 30, 2007, petitioner filed a petition for writ of habeas corpus in the California
18 Supreme Court. Exh. 5. On January 16, 2008, the court denied petitioner's habeas petition. Exh.
19 6.

20 Petitioner filed his petition before this Court on March 4, 2008, raising the claim that the
21 imposition of the upper term by the court violated the Sixth Amendment.

22 **ARGUMENT**

23 **I.**

24 **THE PETITION IS UNTIMELY**

25 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), petitioner
26 had one year from the date his state judgment became final by the conclusion of direct review to file
27 a habeas corpus petition in federal court. 28 U.S.C. § 2244(d)(1)(A). Direct review in this case
28 concluded on June 1, 1999, when the time to file a notice of appeal expired. *See* Cal. Rules of Court,

1 rule 31(a) (defendant has 60 days from the time judgment is rendered to file notice of appeal). Thus,
2 absent any tolling, petitioner had until June 1, 2000, to file a timely habeas corpus petition in federal
3 court. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

4 The AEDPA allows for tolling during the pendency of a “properly filed application for
5 State post-conviction or other collateral review with respect to the pertinent judgment or claim.”
6 28 U.S.C. § 2244(d)(2). However, “section 2244(d) does not permit the reinitiation of the
7 limitations period that has ended before the state petition was filed.” *Ferguson v. Palmateer*, 321
8 F.3d 820, 823 (9th Cir. 2003); *accord, Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Rashid*
9 *v. Khulmann*, 991 F. Supp. 254, 259 (S.D. N.Y. 1998) (“The tolling provision does not, however,
10 ‘revive’ the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that
11 has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve
12 to avoid a statute of limitations.”). Petitioner did not begin filing his state habeas corpus petitions
13 until January 31, 2007, almost seven years after the limitations period had expired. Accordingly,
14 the state collateral proceedings did not toll the statute. Petitioner did not file this petition under
15 March 4, 2008, seven years and nine months after the limitations period ended. Therefore, the
16 petition is untimely and must be dismissed with prejudice.

17 Petitioner may contend the petition was timely under 28 U.S.C. § 2244 (d)(1)(C), which
18 specifies that the statute of limitations shall run from “the date on which the constitutional right
19 asserted was initially recognized by the Supreme Court, if the right has been newly recognized by
20 the Supreme Court and made retroactively applicable to cases on collateral review” The cases
21 on which petitioner relies were all decided after his judgment became final. *See Apprendi v. New*
22 *Jersey*, 530 U.S. 466 (2000) (June 26), *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham*
23 *v. California*, 549 U.S. 270 [127 S.Ct. 856] (2007). Since petitioner first challenged his sentence
24 in state court in 2007, his federal petition might have been timely had *Cunningham* announced a
25 “newly recognized” right. However, it did not. *See Butler v. Curry*, 528 F.3d 624 (9th Cir. 2008).
26 Nor is that right, originally announced in *Apprendi*, retroactive to decisions final before the opinion
27 was issued. *See United States v. Jenkins*, 333 F.3d 151, 153-154 (3d Cir. 2003); *United States v.*
28 *Sanders*, 247 F.3d 139, 149-151 (4th Cir. 2001); *United States v. Brown*, 305 F.3d 304, 309 (5th Cir.

2002); *Curtis v. United States*, 294 F.3d 841, 842 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993, 999-1000 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 669-670 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1218 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1257-1258 (11th Cir. 2001). Accordingly, 28 U.S.C. § 2244 (d)(1)(C) does not apply. The petition is untimely and must be dismissed with prejudice.

II.

THE PETITION IS PROCEDURALLY BARRED

Application of *Apprendi*, *Blakely*, or *Cunningham* to petitioner's case would violate the rule of *Teague v. Lane*, 489 U.S. 288 (1989). In that case, the Supreme Court held that a new rule of constitutional law cannot be applied retroactively on federal collateral review,^{1/} unless the new rule forbids criminal punishment of individual conduct or is a "watershed" rule of criminal procedure. *Caspari v. Bohlen*, 510 U.S. 383, 396 (2004). The federal habeas court must first decide whether *Teague* is implicated before considering the merits of a claim if the state argues that the petitioner seeks the benefit of a new rule. *Beard v. Banks*, 542 U.S. 406, 412 (2004); *Horn v. Banks*, 536 U.S. 266, 272 (2002). For purposes of *Teague*, a rule is considered new if the federal habeas court surveys the legal landscape as it then existed and determines that the rule was not "dictated by precedent." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). Thus, a rule is not constitutionally compelled if the survey shows that "reasonable jurists" could differ about the outcome. *Caspari v. Bohlen*, 510 U.S. at 395.

In *Cunningham*, the Supreme Court indicated that its previous opinions "from *Apprendi* to [*United States v. Booker*, 543 U.S. 220 (2005)]" pointed to a conclusion that the sentencing court could not impose the upper term absent a jury finding. 127 S.Ct. at 871. However, *Apprendi* and its progeny were all decided after petitioner's case was final. Thus, at the time petitioner's case became final, a survey of the legal landscape would not have compelled a state court to conclude that his sentence violated the Constitution. Accordingly, because the rule of *Apprendi* was "new"

1. For *Teague* purposes, petitioner's conviction became final on June 1, 1999. See *Caspari v. Bohlen*, 510 U.S. 383, 390 (2004).

1 within the meaning of *Teague*, federal habeas relief is barred in this case. For the same reasons, the
2 rule on which petitioner relies was not “clearly established” by the Supreme Court when his case
3 became final, which also precludes relief. 28 U.S.C. § 2254(d)(1).

CONCLUSION

For the reasons stated, respondent respectfully requests that the petition for writ of habeas corpus be dismissed with prejudice.

Dated: July 23, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

/s/ Arthur P. Beever
ARTHUR P. BEEVER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Nawabi v. Hartely, Warden**

No.: **C 08-1258 WHA (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On July 23, 2008, I served the attached

**MOTION TO DISMISS HABEAS CORPUS PETITION AS UNTIMELY AND
PROCEDURALLY BARRED**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Idris Nawabi
P-41591/640-53L
Avenal State Prison
P.O. Box 9
Avenal, CA 93204-0009

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2008, at San Francisco, California.

M. Argarin

Declarant

/s/ M. Argarin

Signature

EXHIBIT 1

COPY

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF ALAMEDA
3 BEFORE THE HONORABLE VERNON K. NAKAHARA, JUDGE
4 DEPARTMENT NO. 7

5 ---000---

ENDORSED
FILED
ALAMEDA COUNTY

7 FEB 22 1999

8 THE PEOPLE OF THE STATE OF
9 CALIFORNIA,

RECEIVED
BY CLERK COURT-CLERK

10 PLAINTIFF,

11 VS.

NO. H23388

12 IDRIS JAVIER NAWABI,

13 DEFENDANT.
14 -----/

15
16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 FRIDAY, FEBRUARY 19, 1999
18 CHANGE OF PLEA/STATE PRISON PENDING
19
20
21

22 APPEARANCES:

23 FOR THE PEOPLE: THOMAS ORLOFF, DISTRICT ATTORNEY
24 BY: MARTIN BROWN, DEPUTY

25 FOR THE DEFENDANT: JULES BONJOUR
26 ATTORNEY AT LAW

27 REPORTED BY: LISA HODGES, CSR #7195
28

FRIDAY, FEBRUARY 19, 1999, MORNING SESSION
PROCEEDINGS

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THE COURT: ON THE NAWABI MATTER.

MR. BONJOUR: JULES BONJOUR APPEARING ON
BEHALF OF MR. NAWABI WHO'S PRESENT.

THE COURT: OKAY. YOU CAN BOTH HAVE A
SEAT.

AND MR. BROWN FOR THE PEOPLE.

MR. NAWABI, IT'S MY UNDERSTANDING THAT YOU'RE
ENTERING A PLEA OF EITHER GUILTY OR NO CONTEST TO
COUNT TWO OF THIS INFORMATION. THAT'S A VIOLATION OF
SECTION 211. THAT'S A FIRST DEGREE 211. YOU'RE GOING
TO ADMIT THE USE CLAUSE.

IT'S MY FURTHER UNDERSTANDING THAT YOU'RE GOING
TO EITHER PLEAD GUILTY OR NO CONTEST TO COUNT FOUR, A
VIOLATION OF SECTION 289, AND YOU ALSO ARE GOING TO
ADMIT THE USE CLAUSE OR PLEAD GUILTY OR NO CONTEST TO
THE USE CLAUSE.

FINALLY, IT'S MY UNDERSTANDING THAT YOU'RE ALSO
GOING TO ENTER A PLEA OF EITHER GUILTY OR NO CONTEST
TO THE COUNT FIVE, VIOLATION OF SECTION 286(C), AND
ADMIT THE USE CLAUSE.

MR. BONJOUR: NO ADMISSION ON THAT COUNT.

THE COURT: NO ADMISSION ON THAT COUNT.

AND THEN AS A DIRECT CONSEQUENCE OF ALL OF THAT,
THE INDICATED SENTENCE IS 19 YEARS --

MR. BONJOUR: FOUR MONTHS.

1 THE COURT: -- AND FOUR MONTHS.
2 IF IT TURNS OUT -- I'M SORRY. YOU'RE RIGHT.
3 WELL, I HAVE -- OFF THE RECORD.
4 (PAUSE IN PROCEEDINGS.)

5 THE COURT: BACK ON THE RECORD.
6 THEN, MR. NAWABI, THAT WILL BE A TOTAL OF 19
7 YEARS, 4 MONTHS.

8 I INDICATED TO YOUR ATTORNEY THAT I WOULD MAKE
9 THAT A NO MORE THAN 19 YEARS, 4 MONTHS, AND HE WILL
10 HAVE THE OPPORTUNITY TO ARGUE TO ME THAT YOU GET LESS
11 THAN, BUT IT IS A POSSIBILITY THAT YOU GET THE FULL
12 AMOUNT OF 19 YEARS, 4 MONTHS.

13 DO YOU UNDERSTAND THAT?

14 THE DEFENDANT: YES.

15 THE COURT: ALL OTHER COUNTS AND CLAUSES
16 WILL THEN BE DISMISSED.

17 IS THAT YOUR UNDERSTANDING OF THE DISPOSITION IN
18 YOUR CASE?

19 THE DEFENDANT: YES.

20 THE COURT: ALL RIGHT.

21 NOW I HAVE IN MY HAND, MR. NAWABI, A WAIVER ON
22 PLEA OF GUILTY OR NO CONTEST FORM. ARE THESE YOUR
23 INITIALS IN THE BOXES AND THIS IS YOUR SIGNATURE HERE
24 ON THE BACK?

25 THE DEFENDANT: YES.

26 THE COURT: HAVE YOU HAD A SUFFICIENT
27 AMOUNT OF TIME, HAVE YOU HAD ENOUGH TIME TO GO OVER
28 THIS FORM WITH YOUR ATTORNEY?

1 THE DEFENDANT: YES.

2 THE COURT: AND YOU UNDERSTAND THE RIGHTS
3 THAT YOU HAVE, THE RIGHTS THAT YOU'RE GIVING UP AND
4 THE CONSEQUENCES OF YOUR PLEA?

5 THE DEFENDANT: YES.

6 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT
7 ANY ITEMS ON THIS FORM?

8 THE DEFENDANT: NO.

9 THE COURT: MR. BONJOUR, YOU HAD A
10 SUFFICIENT AMOUNT OF TIME TO GO OVER THIS WAIVER FORM
11 AND THE PROPOSED DISPOSITION WITH YOUR CLIENT?

12 MR. BONJOUR: I HAVE, YOUR HONOR.

13 THE COURT: AND YOU'RE SATISFIED HE
14 UNDERSTANDS HIS RIGHTS AND THE CONSEQUENCES THEREOF?

15 MR. BONJOUR: I AM.

16 THE COURT: AND YOU ALSO HAVE SIGNED THIS
17 FORM?

18 MR. BONJOUR: I HAVE.

19 THE COURT: NOW, MR. NAWABI, I CAN TELL YOU
20 THAT I AM GOING TO GIVE YOU STATE PRISON. THE AMOUNT
21 OF TIME IS NOT GOING TO BE MORE THAN 19 YEARS, 4
22 MONTHS, BUT I AM GOING TO GIVE YOU STATE PRISON.

23 DO YOU UNDERSTAND THAT?

24 THE DEFENDANT: YES.

25 THE COURT: NOW, AFTER YOU FINISH YOUR TERM
26 IN STATE PRISON, YOU WILL BE RELEASED ON PAROLE. THE
27 TERM OF YOUR PAROLE WILL BE DETERMINED BY THE
28 DEPARTMENT OF CORRECTIONS AND THE CONDITIONS OF THAT

1 PAROLE.

2 IF YOU VIOLATE ANY OF THE TERMS OR CONDITIONS OF
3 YOUR PAROLE, AFTER YOU FINISH YOUR TERM IN STATE
4 PRISON, THE BOARD OF PRISON TERMS CAN SEND YOU BACK TO
5 STATE PRISON FOR UP TO ONE YEAR FOR EACH VIOLATION.

6 DO YOU UNDERSTAND THAT?

7 THE DEFENDANT: YES.

8 THE COURT: YOU ALSO UNDERSTAND THAT IF
9 YOU'RE NOT A CITIZEN OF THE UNITED STATES, CONVICTION
10 OF ANY CRIMINAL OFFENSE COULD RESULT IN YOUR
11 DEPORTATION, EXCLUSION FROM THE UNITED STATES OR
12 DENIAL OF NATURALIZATION.

13 DO YOU UNDERSTAND THAT?

14 THE DEFENDANT: YES.

15 MR. BONJOUR: IN THAT REGARD, YOUR HONOR, I
16 INSTRUCTED MR. NAWABI FURTHER THAT AT LEAST ONE OF THE
17 FELONIES HE'S PLEADING TO IS CONSIDERED TO BE AN
18 AGGRAVATED FELONY BY THE IMMIGRATION OF NATURALIZATION
19 SERVICE AND MORE PROBABLY OR NOT WOULD RESULT IN HIS
20 DEPORTATION.

21 THE COURT: FRANKLY, MR. NAWABI, THAT
22 PROBABLY IS TRUE. I'M SURE THAT MR. BONJOUR HAS
23 ADVISED YOU TO THAT. NO ONE, HOWEVER, CAN TELL YOU
24 WHETHER YOU'RE GOING TO BE DEPORTED OR NOT. SOME
25 JUDGES ADVISE THE CLIENT THAT YOU ARE GOING TO BE
26 DEPORTED AND THEN GO FROM THERE. I CANNOT PREDICT
27 WHAT I.N.S. IS GOING TO DO IN THIS MATTER, BUT THAT'S
28 WHY I'M ADVISING YOU THAT YOU COULD, CAN BE DEPORTED.

1 DO YOU UNDERSTAND ALL OF THAT?

2 THE DEFENDANT: YES.

3 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT
4 ANY OF THAT?

5 THE DEFENDANT: NO.

6 THE COURT: OKAY.

7 YOU ALSO SHOULD BE ADVISED THAT THESE ARE
8 SERIOUS FELONY OFFENSES AND THAT IF IN THE FUTURE
9 YOU'RE ARRESTED AND CONVICTED OF ANY SERIOUS OR ANY
10 FELONY OFFENES THAT YOU WOULD BE LOOKING AT A LIFE TOP
11 IN STATE PRISON.

12 DO YOU UNDERSTAND THAT?

13 THE DEFENDANT: YES.

14 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT
15 THAT ISSUE?

16 THE DEFENDANT: NO.

17 THE COURT: OKAY.

18 YOU ALSO SHOULD BE ADVISED THAT THERE'S GOING TO
19 BE A PAROLE REVOCATION FUND FINE THAT WILL BE EQUAL TO
20 THE RESTITUTION FUND FINE THAT YOU WILL BE REQUIRED TO
21 PAY.

22 DO YOU UNDERSTAND THAT?

23 THE DEFENDANT: YES.

24 THE COURT: YOU HAVE A RIGHT TO A SPEEDY,
25 COURT OR JURY TRIAL WHERE THE DISTRICT ATTORNEY HAS
26 THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A
27 CRIME WAS COMMITTED AND THAT YOU COMMITTED THAT
28 CRIME.

1 DO YOU UNDERSTAND AND GIVE UP THAT RIGHT?

2 THE DEFENDANT: YES.

3 THE COURT: YOU HAVE A RIGHT TO CONFRONT
4 AND CROSS-EXAMINE THE WITNESSES, WHICH MEANS, THROUGH
5 YOUR ATTORNEY, YOU MAY QUESTION ALL WITNESSES
6 PRESENTED AGAINST YOU.

7 DO YOU UNDERSTAND AND GIVE UP THAT RIGHT?

8 THE DEFENDANT: YES.

9 THE COURT: YOU ALSO HAVE A RIGHT TO
10 PRESENT EVIDENCE ON YOUR OWN BEHALF AND USE THE
11 SUBPOENA POWER OF THE COURT TO BRING IN ANY WITNESSES
12 WHO MAY HELP YOU IN YOUR DEFENSE AT NO COST TO YOU.

13 DO YOU UNDERSTAND AND GIVE UP THAT RIGHT?

14 THE DEFENDANT: YES.

15 THE COURT: YOU ALSO HAVE A RIGHT TO REMAIN
16 SILENT. NO ONE CAN FORCE YOU TO TESTIFY AGAINST
17 YOURSELF OR SAY ANYTHING THAT MAY TEND TO INCRIMINATE
18 YOU.

19 DO YOU UNDERSTAND AND GIVE UP THAT RIGHT?

20 THE DEFENDANT: YES.

21 THE COURT: YOU ALSO HAVE A RIGHT TO APPEAL
22 ANY ISSUES AND MAKE ANY MOTIONS THAT MIGHT APPLY TO
23 YOUR PARTICULAR CASE.

24 DO YOU UNDERSTAND AND GIVE UP THOSE RIGHTS?

25 THE DEFENDANT: YES.

26 THE COURT: HAS ANYONE PROMISED YOU
27 ANYTHING OTHER THAN WHAT'S BEEN STATED IN OPEN COURT?

28 THE DEFENDANT: NO.

1 THE COURT: HAS ANYBODY THREATENED YOU,
2 FORCE YOU TO ENTER THIS PLEA AND GIVE UP YOUR RIGHTS?

3 THE DEFENDANT: NO.

4 THE COURT: YOU'RE DOING SO FREELY AND
5 VOLUNTARILY WITH FULL KNOWLEDGE OF ALL THE RIGHTS THAT
6 YOU HAVE?

7 THE DEFENDANT: YES.

8 THE COURT: COUNSEL, THIS PLEA IS WITH YOUR
9 CONSENT?

10 MR. BONJOUR: IT IS, YOUR HONOR.

11 THE COURT: IS THERE A STIPULATED FACTUAL
12 BASIS?

13 MR. BROWN: YES.

14 MR. BONJOUR: MAY I APPROACH?

15 THE COURT: YOU MAY.

16 IS THERE A STIPULATED FACTUAL BASIS?

17 MR. BONJOUR: THERE IS, YOUR HONOR.

18 MR. BROWN: YES.

19 THE COURT: I FIND THE DEFENDANT HAS BEEN
20 FULLY ADVISED. HE UNDERSTANDS HIS CONSTITUTIONAL
21 RIGHTS, FREELY, VOLUNTARILY, KNOWINGLY AND
22 INTELLIGENTLY WAIVED THOSE RIGHTS.

23 I FURTHER FIND THERE IS A FACTUAL BASIS FOR THE
24 PLEA BASED UPON MY REVIEW OF THE FILE.

25 LET ME FURTHER ADVISE YOU, MR. NAWABI, THAT TWO
26 OF THESE MATTERS ARE REGISTERABLE OFFENSES UNDER
27 SECTION 290 OF THE PENAL CODE, AND YOU MUST SUBMIT
28 BLOOD AND SALIVA SAMPLES UNDER SECTION 296 OF THE

1 PENAL CODE.

2 DO YOU UNDERSTAND BOTH OF THOSE MATTERS?

3 THE DEFENDANT: YES.

4 THE COURT: ALL RIGHT.

5 AND I'M GOING TO SIGN THE 296 AT THIS POINT.

6 YOU STILL WISH TO PROCEED WITH THIS MATTER? YOU
7 STILL WISH TO PROCEED?

8 THE DEFENDANT: YES.

9 THE COURT: ALL RIGHT.

10 WHAT IS YOUR PLEA TO ON OR ABOUT DECEMBER 12TH,
11 1996, YOU COMMITTED A FELONY, A VIOLATION OF SECTION
12 211 IN THE FIRST DEGREE, THAT IS A RESIDENTIAL
13 ROBBERY: GUILTY OR NO CONTEST?

14 THE DEFENDANT: NO CONTEST.

15 THE COURT: I'LL ACCEPT THE NO CONTEST PLEA
16 AND MAKE A FACTUAL FINDING OF GUILT.

17 WHAT IS YOUR PLEA TO DURING THE COMMISSION OR
18 ATTEMPTED COMMISSION OF THE ABOVE OFFENSE, THAT IS THE
19 FIRST DEGREE ROBBERY IN COUNT TWO, YOU PERSONALLY USED
20 A DEADLY OR DANGEROUS WEAPON, TO WIT, A KNIFE: GUILTY
21 OR NO CONTEST?

22 THE DEFENDANT: NO CONTEST.

23 THE COURT: I'LL ACCEPT THE NO CONTEST PLEA
24 AND MAKE A FACTUAL FINDING OF GUILT.

25 WHAT IS YOUR PLEA TO COUNT FOUR, AND THAT IS A
26 VIOLATION OF SECTION 289 THAT OCCURRED ON OR ABOUT
27 DECEMBER 12TH OF 1996, A VIOLATION OF SECTION 289 AS
28 STATED IN COUNT FOUR OF THIS INFORMATION: GUILTY OR

1 NO CONTEST?

2 THE DEFENDANT: NO CONTEST.

3 THE COURT: I'LL ACCEPT THE NO CONTEST PLEA
4 AND MAKE A FACTUAL FINDING OF GUILT.

5 WHAT IS YOUR PLEA TO DURING THE COMMISSION OR
6 ATTEMPTED COMMISSION OF THE ABOVE OFFENSE THAT IS IN
7 COUNT FOUR, YOU, PERSONALLY, USED A DEADLY OR
8 DANGEROUS WEAPON, TO WIT, A KNIFE: GUILTY OR NO
9 CONTEST?

10 THE DEFENDANT: NO CONTEST.

11 THE COURT: I'LL ACCEPT THE NO CONTEST PLEA
12 AND MAKE A FACTUAL FINDING OF GUILT.

13 WHAT IS YOUR PLEA TO ON OR ABOUT DECEMBER 12TH
14 OF 1996, YOU COMMITTED A FELONY, A VIOLATION OF
15 SECTION 286(C) OF THE PENAL CODE, AS CHARGED IN COUNT
16 FIVE OF THIS INFORMATION: GUILTY OR NO CONTEST?

17 THE DEFENDANT: NO CONTEST.

18 THE COURT: I'LL ACCEPT THE NO CONTEST PLEA
19 AND MAKE A FACTUAL FINDING OF GUILT.

20 MADAM CLERK, ALL OTHER COUNTS AND CLAUSES WILL
21 BE DISMISSED PURSUANT TO THE NEGOTIATED DISPOSITION.

22 MR. NAWABI, YOU HAVE A RIGHT TO A SENTENCING
23 HEARING IN 20 COURT DAYS. DO YOU WISH TO WAIVE THAT
24 RIGHT OR NOT?

25 THE DEFENDANT: YES.

26 THE COURT: WE'LL SHOW A TIME WAIVER FOR
27 SENTENCE, MADAM CLERK.

28 MR. BONJOUR: AT LEAST SIX WEEKS, PLEASE.

1 THE CLERK: APRIL 2ND, 9:05 IN DEPARTMENT
2 32.

3 MR. BONJOUR: THAT'S FINE.

4 THE COURT: IT WILL BE APRIL 2ND, 9:05 IN
5 DEPARTMENT 32.

6 ANYTHING FURTHER?

7 MR. BONJOUR: NO, YOUR HONOR.

8 THE COURT: THAT WILL BE THE ORDER.

9 MR. BONJOUR: I TAKE IT HE DOES NOT SIGN
10 THIS ORDER?

11 THE COURT: NO.

12 (PROCEEDINGS ADJOURNED.)

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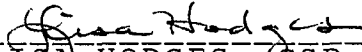
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1 STATE OF CALIFORNIA)
2 COUNTY OF ALAMEDA) SS
3
4
5

6 I, LISA HODGES, A CERTIFIED SHORTHAND
7 REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING IS A
8 FULL, TRUE AND ACCURATE TRANSCRIPT OF MY SHORTHAND
9 NOTES TAKEN OF THE AFOREMENTIONED PROCEEDINGS AT THE
10 TIME AND PLACE THEREIN INDICATED.

11 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY
12 HAND THIS FEBRUARY 22, 1999.

13
14 
15 LISA HODGES, CSR #7195-----
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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE VERNON NAKAHARA

DEPARTMENT NO. 32

--oOo--

APR 27 1999

ENDORSED
FILED

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

No. H23388

IDRIS JAVIER NAWABI,

Defendant.

COPY

REPORTER'S TRANSCRIPT OF

The foregoing instrument is a true and correct copy of the original on file in this office.

ATTEST:

FRIDAY, APRIL 2, 1999

--oOo--

APR 29 1999

HAYWARD HALL OF JUSTICE

Ronald G. Overholt, Clerk of the Superior Court of California, County of Alameda

By [Signature] Deputy

--oOo--

A P P E A R A N C E S

For the People: THOMAS J. ORLOFF, District Attorney
BY: MARTIN BROWN, Deputy

For the Defendant: JULES BONJOUR, Attorney

Reported by: RACHAEL A. MILLER
CSR NO. 11099

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6-18-99
[Signature]

FRIDAY, APRIL 2, 1999

--oOo--

The matter of the People of the State of California versus IDRIS NAWABI, Defendant, Case Number H23388, came on regularly before the Honorable VERNON NAKAHARA, Judge of the Superior Court of the State of California, for the County of Alameda, Department Number 32.

The People were represented by MARTIN BROWN, Deputy District Attorney.

The Defendant, IDRIS NAWABI, was present and represented by JULES BONJOUR, Esquire.

The following proceedings were then had:

--oOo--

THE COURT: Idris Nawabi.

MR. BONJOUR: That matter's ready. Jules Bonjour appearing on behalf of Mr. Nawabi.

THE COURT: I need to -- Mr. Bonjour, I need to get one thing in chambers.

Okay. This matter's on for sentencing. Waive formal reading, arraignment?

MR. BONJOUR: Yes, Your Honor.

THE COURT: Any legal cause?

MR. BONJOUR: No.

THE COURT: For the record, let me indicate that --

MR. BONJOUR: I would like to address the Court, however, before you do impose sentence.

THE COURT: Right. For the record then I have

1 read and considered the lengthy probation report in this
2 matter.

3 I have read and considered all the materials that
4 have been submitted by Mr. Bonjour, including the report
5 by Dr. Wornian, which is a very lengthy report. I've read
6 the transcript on the change of plea, and I also have
7 the -- the letter by Ms. Ryals, who is his previous
8 attorney, the letter from the Nawabi family, the probation
9 report I said, and also the two-page letter from the
10 victim in this matter that Ms. Elaine Lopes from the
11 Victim-Witness Program has submitted to the Court.

12 Those are the items that I have considered in this
13 particular case. Mr. Brown or Mr. Bonjour, is there
14 anything further?

15 MR. BONJOUR: There's one additional document,
16 Your Honor, that I didn't give to the Court. It's a short
17 note, but it's signed by many members of the Afghan
18 community expressing their support for Mr. Nawabi.

19 THE COURT: Mr. Brown.

20 MR. BROWN: I have nothing to submit to the
21 Court.

22 THE COURT: Do you want to see this?

23 MR. BROWN: No. That's fine.

24 THE COURT: Okay. Any further comments?

25 MR. BONJOUR: Yes, Your Honor. Yesterday
26 afternoon, Mr. Powell at the probation department faxed to
27 me a copy of his report, and attached to that report was
28 the two-page letter from the victim in this case.

1 It was a powerful reminder of what a terrible crime
2 this is, and I must say it took me a few minutes to
3 recover from an emotional impact that it had on me. Then
4 I re-read Dr. Wornian's report, and what I felt after
5 reading that was that while this was a terrible crime, it
6 was not committed by a terrible person, but committed by a
7 person who had experienced a terrible life.

8 I think we're all the product of our experiences as
9 children and as young adults. And if a child is subjected
10 to physical abuse, sexual abuse, watching his mother
11 abused in his presence, dislocated from his home by a
12 terrible war, and then transported to a foreign country
13 and left to his own devices, deals with his pain by the
14 use of drugs, it's a way of understanding how all of this
15 anger that he had was one terrible night directed at a
16 totally innocent person.

17 Dr. Wornian observed, and I'll quote from the
18 report, "His has been a world in which violence appears to
19 have been an almost routine and taken for granted feature
20 of everyday life. He has, not surprisingly, adapted to
21 the demands of this world by becoming prone to engaging in
22 acts of violence himself."

23 He then gave Idris a number of tests, and those
24 tests revealed a person who is suffering from probable
25 brain impairment. The measure of his intellectual
26 functioning was within the mentally retarded range, and
27 concluded he manifested signs of the post-traumatic stress
28 disorder.

1 Dr. Wornian concluded by saying Mr. Nawabi needs to
2 be placed in a well structured and well supervised for the
3 living situation, in quote. Dr. Wornian recommends this
4 facility be one where Mr. Nawabi can receive treatment for
5 both his post-traumatic and his substance abuse.

6 And the issue before the Court this morning is how
7 long should that period and that structured setting be. I
8 would like the Court to consider, in addition to Dr.
9 Wornian's report, the fact that Idris was 20 years old at
10 the time he committed this offense; that his prior record
11 was insubstantial, consisting of 22 misdemeanors and a
12 number of traffic violations, and that he has undergone a
13 transformation while in custody during the last year, in
14 large part, I think, because of the fact he's been drug
15 free and he has established reunification with his family;
16 that is his mother and his sisters, and his brother, and
17 he finally realized that rather than being ostracized from
18 the family, being excluded from the family, they truly
19 love him, and they want him to be a member of the family.

20 The Court indicated that you would be sentencing Mr.
21 Nawabi to no more than 19 years and four months. I would
22 ~~ask the Court to consider a sentence of 13 years as~~
23 follows: On Count Four, the principal term, the mid term
24 of six years, plus four years on the use of the knife,
25 which is the mid term of the use enhancement; on Count
26 Five, three years, the mitigated term consecutive; and on
27 Count Two, three years plus one year for the knife,
28 imposition of sentence suspended.

1 I believe that those 13 years combined with the fact
2 that at time of the plea I voir dired Mr. Nawabi on the
3 fact that he was pleading to an aggravated felony for the
4 purposes of immigration and naturalization and it
5 undoubtedly at the completion of his prison sentence he
6 would be deported that the 13 years combined with the
7 deportation is a significant sentence and punishment that
8 both reflects what Mr. Nawabi did.

9 I hope this also offers some protection and
10 assurance for the victim who certainly underwent a
11 terrible experience, and in the end would satisfy what I
12 hope we're all here to achieve and that is some form of
13 justice.

14 There's a large contingency of the Nawabi family
15 here in court, and his sister would ask the Court
16 permission to speak for just two minutes, three minutes,
17 so she can express her feelings.

18 THE COURT: All right. Please, first of all,
19 state your name for the record.

20 MS. NAWABI: My name is Jasmine Nawabi. I'm
21 Idris' sister.

22 THE COURT: Make sure you speak up also.

23 MS. NAWABI: I'm speaking for my family, my
24 brother and myself, and what I'm about to say is coming
25 straight from my heart. And I believe my brother should
26 be given a second chance, because ever since I've known
27 him he's lived an agonizing life, and that shouldn't be
28 the excuse for what he's done, for what crime he's

1 committed, but, Your Honor, consider that he hasn't had
2 much of a life.

3 It's a painful, sad life, and you can't put him away
4 for having this life, you know. I mean, I -- I know I
5 feel sympathy for the victim, but you can't put him away
6 for half his life, because he deserves a second chance.
7 He's a changed person. In the letters he writes, when we
8 go to visit him, to tell that he's changed.

9 I just -- I'm just asking for your Court to have
10 some mercy on my brother. Thank you.

11 THE COURT: Thank you.

12 MR. BONJOUR: Thank you, Your Honor.

13 THE COURT: All right. Mr. Brown, anything
14 further?

15 MR. BROWN: Well, Your Honor, I want to speak a
16 few moments for the victim in this case. You know, the
17 defendant may have had a very sad and unfortunate life,
18 but he went out and hunted and found the victim in this
19 case.

20 He broke into her residence and for three hours
21 terrorized her and did unspeakable things to her. These
22 are things that she will never recover from. These are
23 traumas she will live with the rest of her life.

24 I do not believe in jailhouse transformation. I
25 believe the Court should impose the maximum sentence of 19
26 years, four months based on the harm that was done to the
27 victim in this case and because of all the factors that
28 Wornian refers to. I believe they show the defendant to

1 be a continuing danger and member to society, so I would
2 ask the Court to impose 19 years, four months.

3 MR. BONJOUR: Just a brief comment. He did not
4 hunt out the victim. This was a crime of opportunity. He
5 thought the residence was unoccupied. Unfortunately, it
6 was not unoccupied. He did not hunt her or seek her out.

7 THE COURT: Okay. Let me see the attorneys up
8 here just for a moment.

9 (Whereupon a discussion was held at the bench.)

10 THE COURT: Okay. Then back on the record.
11 The Court has, as I indicated, read and considered all of
12 those matters, including what has been presented here this
13 morning, and I am ready to sentence Mr. Nawabi, unless
14 there's anything further. Mr. Brown?

15 MR. BROWN: Submitted.

16 THE COURT: Mr. Bonjour?

17 MR. BONJOUR: Submitted.

18 THE COURT: Matter being submitted, it is the
19 sentence and judgment of this Court as follows: And that
20 is, with respect to Count Four, Madam clerk, that is a
21 violation of Section 289, the Court is going to use the
22 ~~aggravated term of eight years in state prison. The~~
23 aggravation is because the crime involved great violence,
24 great bodily injury, a high degree of cruelty and
25 viciousness.

26 With respect to the use clause, the Court is using
27 the mid term of four years. That is the use clause as to
28 Count Four. That will be the mid term of four years. So

1 on Count Four, Madam clerk, that will be 12 years in state
2 prison.

3 With respect to Count Five, the Court -- that's a
4 violation of Section 286(C)(3) the Court is going to use the
5 mid term of six years. That six years in Count Five is to
6 run consecutive to the 12 years in Count Four. With
7 respect to the Count Two, that is a violation of Section
8 211. The Court is going to use the mitigated term on the
9 211 of three years. One-third the mid term -- one-third
10 of that would be one year, and then the use clause as to
11 Count Two, Madam clerk, that would be four months.

12 So on Count Two, that would be a total of one year,
13 four months. That one year, four months is to run
14 consecutive to the six years in Count Five, to the four
15 years in -- I'm sorry -- to the 12 years in Count Four.

16 That will be a total of 19 years, four months, and
17 that will be served at 85 percent.

18 MR. BROWN: Your Honor, as to Count Two, the
19 211, I believe three years is the middle term.

20 THE COURT: No. I think -- do you show that as
21 the mid? I show it is --

22 ~~MR. BROWN: Two, three, four. Two, three,~~
23 five.

24 THE COURT: I show it is a four, five, six.

25 MR. BROWN: Is it charged 211?

26 THE COURT: First.

27 MR. BONJOUR: Yeah.

28 MR. BROWN: Okay. All right.

1 THE COURT: All right. So that will be 19
2 years, four months in state prison. He has how many
3 actual?

4 THE BAILIFF: 842 actual.

5 THE COURT: I'm sorry.

6 ~~THE BAILIFF: 842 actual, plus 127 Sage for a~~
7 total of 969 dates credit for time served. That's at 85
8 percent.

9 THE COURT: That's at 85 percent. The Court
10 will also assess a restitution fund fine in the amount of
11 \$10,000. There will be a similar parole revocation fund
12 fine of \$10,000 that will be suspended.

13 He is remanded into the custody of the sheriff's
14 department to be delivered to the Department of
15 Corrections for the service of the sentence.

16 And, Mr. Nawabi, it is one of the -- I did read all
17 of the stuff concerning your particular background, and
18 frankly, I agree with Mr. Bonjour is that your life has
19 been one of hell.

20 On the other hand, I think that on this particular
21 occasion, hell started for your particular victim. And
22 ~~I've considered all of the materials submitted to me, and~~
23 I believe that is a fair and just sentence in this case.

24 Anything further?

25 MR. BONJOUR: No, Your Honor.

26 MR. BROWN: No.

27 THE COURT: All right. That will be the
28 order.

(Whereupon the matter was adjourned.)

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ENDORSED
FILED
ALAMEDA COUNTY

1

AUG 18 2003

CLERK OF THE SUPERIOR COURT
By MARILYN SAGE Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
BEFORE THE HONORABLE GARY M. PICETTI, JUDGE
DEPARTMENT NO. 513

THE PEOPLE OF THE STATE
OF CALIFORNIA,

No. H23388

Plaintiff,

vs.

IDRIS JAVIER NAWABI,

Defendant.

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
PROCEEDINGS ON SENTENCE-STATE PRISON COMMITMENT

HAYWARD HALL OF JUSTICE
HAYWARD, CALIFORNIA

(FRIDAY, AUGUST 8, 2003)

APPEARANCES:

For the People:

CHRIS LAMIERO
Deputy District Attorney

For the Defendant:

JULES BONJOUR
Attorney at Law

Reported by: Brenda A. Scott, CSR #6336

1 FRIDAY, AUGUST 8, 2003, 11:44 A.M.

2 PROCEEDINGS

3 ---oOo---

4
5 MR. BONJOUR: Good morning. Could we call line 13
6 on the 9:05 calendar, and can Mr. Lamiero and I approach on
7 that?

8 (Off-the-record discussion at the bench.)

9 THE COURT: All right. Calling the matter of
10 People versus Idris Javier Nawabi.

11 Counsel state their appearances, please.

12 MR. BONJOUR: Yes. Good morning. Jules Bonjour
13 for Mr. Nawabi. He's not present. He's in custody in state
14 prison.

15 MR. LAMIERO: Chris Lamiero for the People.

16 MR. BONJOUR: I asked the matter be put on calendar
17 to be -- to correct the Abstract of Judgment that was
18 sentenced to state prison indicating that Mr. Nawabi was
19 convicted of 286(c), sex with a minor, a person under the age
20 of 14.

21 I've shown I hope to the Court's satisfaction and,
22 in fact, he pled to Count 5 of the Information which was
23 sodomy by threat or retaliation. ~~The victim in this case and~~
24 ~~parties will agree was 45/ years old.~~ The offense was serious.
25 The mischaracterization of the offense is causing problems
26 for Mr. Nawabi as the Court might understand.

27 I'm asking that the Abstract of Judgment be amended
28 to show that he was convicted of an -- an offense, 286(c)(3),

1 sodomy by threat of retaliation, and that that corrected
2 Abstract be sent to the Department of Corrections.

3 THE COURT: All right. So we're still talking
4 about Count 5. We're just changing the offense and the
5 description of the offense, am I correct?

6 MR. BONJOUR: Yes.

7 THE COURT: That seems to be consistent with the
8 Abstract or, excuse me, with the transcript of the plea and
9 the Information just pled to. So your motion to amend the
10 Abstract of Judgment to reflect -- instead of 286 of the Penal
11 Code to reflect 286(c)(3). Are those both parens?

12 MR. BONJOUR: Yes. Paren small C and paren 3.

13 THE COURT: Okay. And we'll also amend the
14 description of the crime to be sodomy by threat or
15 retaliation. Otherwise, the new Abstract of Judgment will be
16 exactly the same.

17 The sentencing and everything imposed are all
18 correct, is that right?

19 MR. BONJOUR: That is correct.

20 THE COURT: All right, so ordered.

21 MR. BONJOUR: Thank you.

22 THE COURT: The main thing is that we make that
23 change on Count 5, 286 with small C and a 3 in parens, and
24 that we just change the definition.

25 THE CLERK: Okay.

26 THE COURT: Here it shows sodomy with a person 14
27 which is incorrect. Now it will show sodomy by threat or
28 retaliation. Otherwise everything else is exactly the same.

1 MR. BONJOUR: Can you give me the best estimate,
2 how long will that take to get sent off to the Department of
3 Corrections?

4 THE CLERK: When that goes down today, I don't know
5 how soon. I can write urgent on it to make sure it gets
6 priority.

7 MR. BONJOUR: Thanks very much.

8
9 (Proceedings concluded at 11:50 a.m.)

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3 State of California)

4) ss.

5 County of Alameda)
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9 I, Brenda A. Scott, Official Court Reporter of the
10 Superior Court, County of Alameda, State of California, do
11 hereby certify that the foregoing transcript in the matter of
12 People vs. Nawabi comprise a full, true and accurate
13 transcript of the proceedings had in the within entitled
14 matter, recorded by me by computer-assisted stenotype at the
15 time and place therein stated.

16 In compliance with Section 8016 of the Business and
17 Professions Code, I certify under penalty of perjury that I am
18 a Certified Shorthand Reporter with license number 6336 in
19 full force and effect.

20 Witness my hand this 12th day of August, 2003.
21


22
23 
24 Brenda A. Scott,
25 Certified Shorthand Reporter
26
27
28

EXHIBIT 2

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Dept. No. 008

Date: March 28, 2007 Hon. VERNON K. NAKAHARA, Judge

Kristi O'Hern, Deputy Clerk.
Not Reported, Reporter

IN RE

IDRIS JAVIER NAWABI

Petitioner

Counsel appearing
for Petitioner

No Appearance

vs.

Counsel appearing
for Respondent

No Appearance

PEOPLE OF THE STATE OF CALIFORNIA

Respondent

Nature of Proceedings: **ORDER OF THE COURT
REGARDING PETITION FOR
WRIT OF HABEAS CORPUS**

**CASE NO. H23388
PFN: AWW161
CEN: 6202632**

This Court, having reviewed the Petition for Writ of Habeas Corpus filed on January 31, 2007

by Petitioner IDRIS JAVIER NAWABI, NOW HEREBY ORDERS:

The Petition for Writ of Habeas Corpus is **DENIED**.

Please find the enclosed Endorsed Filed copy of Judge Nakahara's order signed and filed March 28, 2007.

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served **ORDER OF THE COURT** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Dated: March 28, 2007

By


Kristi O'Hern, Deputy Clerk

NAWABI ORDER ON WRIT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

IN RE

INDRIS JAVIER NAWABI,

No. H23388

Petitioner.

ENDORSED
FILED
ALAMEDA COUNTY

MAR 28 2007

CLERK OF THE SUPERIOR COURT
By KRISTI O'HERN
DEPUTY

ORDER

RE: Denying Petition for
Writ of Habeas Corpus

_____/

This Court having reviewed the Petition for Writ of Habeas Corpus ("Petition") filed on January 31, 2007 by Petitioner INDRIS JAVIER NAWABI ("Petitioner"), **NOW HEREBY ORDERS:**

The Petition is denied.

Petitioner contends that the trial court erred in imposing the aggravated term in his case citing *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 US. ____, 2007 WL 135687 (*Cunningham*). On February 19, 1999, Petitioner pled no contest to one count of sodomy, one count of vaginal penetration by a foreign object and one count of 1st degree robbery. On April 2, 1999, Petitioner was sentenced to 19 years and 4 months in prison. This Court imposed the aggravated term on the vaginal penetration count, and the middle term on the other two counts, which ran consecutive. Petitioner's time to appeal expired June 1, 1999. (See former Cal. Rule of Court, rule 30.1, subd. (a); Cal. Rule of Court, rule 8.308, subd. (a).)

Cunningham relied on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, and *United States v. Booker* (2005) 543 U.S. 220. As such, it does not appear that *Cunningham* announced a new rule. (See *Saffle v. Parks* (1990) 494 U.S. 484, 488.) Therefore, this Court does not believe *Cunningham* applies only to cases not yet final as of January 22, 2007, the date of the decision. *Apprendi* is the earliest of cases in which *Cunningham* relies on, and *Apprendi* was decided on June 26, 2000. Assuming that *Apprendi* is controlling, numerous federal courts have held that *Apprendi* is not retroactive to cases final as of the date of the *Apprendi* decision. (See *United States v. Jenkins* (3d Cir. 2003) 333 F.3d 151, 153-154; *United States v. Sanders* (4th Cir. 2001) 247 F.3d 139, 149-151; *United States v. Brown* (5th Cir. 2002) 305 F.3d 304, 309; *Curtis v. United States* (7th Cir. 2002) 294 F.3d 841, 842; *United States v. Moss* (8th Cir. 2001) 252 F.3d 993, 999-1000; *United States v. Sanchez-Cervantes* (9th Cir. 2002) 282 F.3d 664, 669-670; *United States v. Mora* (10th Cir. 2002) 293 F.3d 1213, 1218; *McCoy v. United States* (11th Cir. 2001) 266 F.3d 1245, 1257-1258.) This Court is persuaded by the federal authorities cited herein and finds that *Apprendi* is not retroactive to cases that had been final as of the date of the decision. Petitioner's conviction was final as of the *Apprendi* decision, therefore, *Apprendi* does not apply to his case.

DATED: MAR 28 2007

VERNON NAKAHARA

JUDGE VERNON NAKAHARA

EXHIBIT 3

Name IDRIS JAVIER NAWABI
 Address CALIFORNIA MEN'S COLONY ST. PRISON
P.O. BOX 8101 / U2-17-45L
SAN LUIS OBISPO, CA 93409-8101
 CDC or ID Number P-41591

ORIGINAL
FILED

APR 26 2007
 Court of Appeal - First App. Dist.
 By DIANA HERBERT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST DISTRICT COURT OF APPEAL
 (Court)

IDRIS JAVIER NAWABI
 Petitioner
 vs.
PEOPLE OF THE STATE OF CALIFORNIA
 Respondent

DIVISION THREE
 PETITION FOR WRIT OF HABEAS CORPUS

No. _____
 (To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

A 117491

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- ☒ A conviction
 ☐ Parole
☒ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline

☒ Other (specify): ORDER IMPOSING PRISON TERM

1. Your name: IDRIS JAVIER NAWABI
2. Where are you incarcerated? CALIFORNIA MEN'S COLONY ST. PRISON
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

PENETRATION OF VAGINAL / WITH USE OF A DEADLY WEAPON, SODOMY AND ROBBERY - 1ST DEGREE / WITH USE OF A DEADLY WEAPON.

- b. Penal or other code sections: P.C. 289, P.C. 286(c)(3), P.C. 261, 12022.3(a) and 12022(b)

- c. Name and location of sentencing or committing court: SUPERIOR COURT OF ALAMEDA COUNTY
1225 FALLON STREET, DEPARTMENT 8, OAKLAND, CALIFORNIA 94612

- d. Case number: H 23388

- e. Date convicted or committed: FEBRUARY 19, 1999

- f. Date sentenced: APRIL 2, 1999

- g. Length of sentence: 19 YEARS AND 4 MONTHS

- h. When do you expect to be released? JUNE 7, 2013

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

JULES BONJOUR,

ATTORNEY AT LAW

4. What was the LAST plea you entered? (check one)

☐ Not guilty
 ☐ Guilty
 ☒ Nolo Contendere
 ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☐ Jury
 ☐ Judge without a jury
 ☐ Submitted on transcript
 ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

THE TRIAL COURT IMPOSED AN ILLEGAL AGGRAVATED TERM (UPPER TERM) ON COUNT 4 - P.C. 289 BASED ON FACTS NOT FOUND TRUE BY A JURY, WHICH IS AND WAS UNCONSTITUTIONAL UNDER CUNNINGHAM V. CALIFORNIA, U.S. SUPREME COURT HELD THAT A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO HAVE A JURY DETERMINE BEYOND A REASONABLE DOUBT ALL FACTS LEGALLY ESSENTIAL TO HIS SENTENCE.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.) (ATTACHED)

IN THE INSTANT MATTER, ON APRIL 2, 1999, THE TRIAL COURT SENTENCED PETITIONER TO 19 YEARS AND 4 MONTHS IN THE STATE PRISON, COMPUTED AS FOLLOWS: THE UPPER TERM OF EIGHT YEARS ON COUNT 4 BASED ON AGGRAVATING FACTORS FOUND BY THE JUDGE AND A CONSECUTIVE FOUR YEARS ENHANCEMENT FOR USE OF A DEADLY WEAPON AND A CONSECUTIVE MIDDLE TERM OF SIX YEARS ON COUNT 5 AND A CONSECUTIVE MIDDLE TERM (1/3 THE MID TERM) OF ONE YEAR ON COUNT 2 AND A CONSECUTIVE FOUR MONTHS FOR USE OF A DEADLY WEAPON. PETITIONER CONTENDS THAT THE MIDDLE TERM OF SIX YEARS ON COUNT 4 - P.C. 289 SENTENCE IS THE HIGHEST TERM THAT CAN BE IMPOSED BASED ON JURY'S VERDICT ALONE, IT IS UNCONSTITUTIONAL TO ALLOW A JUDGE TO IMPOSE A HIGH SENTENCE (UPPER TERM) BASED ON FACTS THAT WERE NOT FOUND BY THE JURY TO BE TRUE BEYOND A REASONABLE DOUBT. THE TWO-YEARS ELEVATION BASED ON JUDICIAL FACTFINDING DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

JONES V. UNITED STATES, 526 U.S. 227 (1999), ALMENDAREZ TORREZ V. UNITED STATES, 523 U.S. 224, 239-247 (1998), APPRENDI V. NEW JERSEY (2000) 530 U.S. 466, RING V. ARIZONA (2002) 536 U.S. 584, BLAKELY V. WASHINGTON (2004) 542 U.S. 296, UNITED STATES V. BOOKER (2005) 543 U.S. 220 AND CUNNINGHAM V. CALIFORNIA (2007) U.S. LEXIS 1324 →
(CONTINUED ON PAGE FOUR OF SIX - b. SUPPORTING CASES, RULES, OTHER AUTHORITY)

7. Ground 2 or Ground _____ (if applicable):

a. Supporting facts:

b. Supporting cases, rules, or other authority (CONTINUED FROM PAGE THREE OF SIX - b. SUPPORTING CASES, RULES, OR AUTHORITIES)

HELD THAT CALIFORNIA D.S.L. IS UNCONSTITUTIONAL, BY PLACING SENTENCE
ELEVATING FACT FINDING WITHIN THE JUDGE'S PROVINCE, VIOLATES A
DEFENDANT'S RIGHT TO TRIAL BY JURY SAFEGUARDED BY THE SIX AND
FOURTEENTH AMENDMENTS TO FIND AGGRAVATING FACTORS TO BE TRUE
TO JUSTIFY FOR IMPOSING THE AGGRAVATED TERM. UNDER THE U.S. SUPREME
COURT CASE-LAWS CITED HEREIN, THE MIDDLE TERM IS A RELEVANT STATUTORY-

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☒ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

b. Result _____ c. Date of decision: _____

d. Case number or citation of opinion, if known: _____

e. Issues raised: (1) _____

(2) _____

(3) _____

f. Were you represented by counsel on appeal? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☒ No. If yes, give the following information:

a. Result _____ b. Date of decision: _____

c. Case number or citation of opinion, if known: _____

d. Issues raised: (1) _____

(2) _____

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

PETITIONER DID NOT MAKE THIS CLAIM ON APPEAL BECAUSE AT THE TIME OF PETITIONER'S SENTENCING, I.E., PRIOR TO APPRENDI, IT WOULD HAVE BEEN FUTILE BECAUSE CALIFORNIA CASE LAW, STATUTES, RULES WOULD HAVE REMAINED A BARRIER TO HIS CLAIM.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszajski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 236].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available? ☐ Yes. ☒ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA.

(2) Nature of proceeding (for example, "habeas corpus petition"): WRIT OF HABEAS CORPUS PETITION.

(3) Issues raised: (a) THE SENTENCING JUDGE IMPOSED AN ILLEGAL AGGRAVATED TERM ON COUNT 4 P.C. 289 BASED ON FACTS NOT FOUND TRUE BY A JURY.

(b) BASED ON CUNNINGHAM V. CALIFORNIA U.S. SUPREME COURT DECISION, PETITIONER'S SENTENCE OF THE UPPER TERM ON COUNT 4 P.C. 289 IMPOSED BY THE JUDGE IS UNCONSTITUTIONAL.

(4) Result (Attach order or explain why unavailable): PETITION FOR WRIT OF HABEAS CORPUS IS DENIED. (SEE EXHIBIT-A)

(5) Date of decision: MARCH 28, 2007

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a). _____

(b) _____

(4) Result (Attach order or explain why unavailable): _____

(5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, DATE OF HEARING: MARCH 28, 2007,

NATURE OF HEARING: ORDER OF THE COURT REGARDING PETITIONER'S WRIT OF HABEAS CORPUS TO REDUCE THE UPPER TERM TO MIDDLE TERM BASED ON CUNNINGHAM. DENIED.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

IN LIGHT OF THE RECENT U.S. SUPREME COURT DECISION REGARDING CUNNINGHAM V. CALIFORNIA (2007) THAT JURIES, NOT JUDGES MUST DETERMINE FACTS

THAT JUSTIFY THE UPPER TERM, WHICH APPLIES IN MY CASE THATS WHY I PETITIONED

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

PETITIONER HAVE EXHAUSTED HIS PETITION OF WRIT OF HABEAS CORPUS TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, THE PETITION IS DENIED, THEREFORE, PETITIONER IS SUBMITTING THIS PETITION TO THIS COURT FOR ORDER.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: APRIL 16, 2007

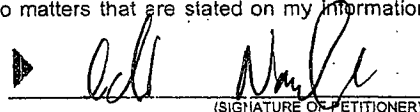

(SIGNATURE OF PETITIONER)

EXHIBIT 4

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

FILED

DIVISION THREE

MAY 10 2007

Court of Appeal - First App. Dist.
DIANA HERBERT

By DEPUTY

In re INDRIS JAVIER NAWABI,
on Habeas Corpus.

A117491

(Alameda County
Super. Ct. No. H23388)

The Court:*

The petition for a writ of habeas corpus is denied.

Dated: MAY 10 2007

McGuinness P.J.

* McGuinness, P.J., Pollak, J., & Siggins, J.

AFFIDAVIT OF TRANSMITTAL

I am a citizen of the United States, over 18 years of age, and not a party to the within action; that my business address is 350 McAllister Street, San Francisco, CA 94102; that I served a copy of the attached material in envelopes addressed to those persons noted below.

That said envelopes were sealed and shipping fees fully paid thereon, and thereafter were sent as indicated via the U.S. Postal Service from San Francisco, CA 94102 or, alternatively, served via inter-office mail.

I certify under penalty of perjury that the foregoing is true and correct.

Diana Herbert, Clerk of the Court

BETH ROBBINS

MAY 10 2007

Deputy Clerk

Date

CASE NUMBER: A117491

Office of the Clerk
Alameda County Superior Court - Main
Attn: Valerie DeClare
1225 Fallon Street, Room 109
Oakland, CA 94612

Material Sent YES: ☒

Idris Javier Nawabi
CDC:P-41591
CMC U2-17-45L
P.O. Box 8101
San Luis Obispo, CA 93409-8101

Material Sent YES: ☒

Office of the Attorney General
455 Golden Gate Avenue - Suite 1100
San Francisco, CA 94102

Material Sent YES: ☒

EXHIBIT 5

SUPREME COURT
FILED

Name IDRIS NAWABI

ORIGINAL

Address California Men's Colony St. Prison

P.O. Box 8101 / CELL: 2081

SAN LUIS OBISPO, CA 93409-8101

CDC or ID Number CDC# P. 41591

JUL 30 2007

Frederick K. Ohlrich Clerk

DEPUTY
JUL 30 2007

CALIFORNIA SUPREME COURT

RECEIVED

(Court)

PETITION FOR WRIT OF HABEAS CORPUS

8154884

No.

(To be supplied by the Clerk of the Court)

IDRIS NAWABI

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

This petition concerns:

- ☒ A conviction
 ☐ Parole
☒ A sentence
 ☐ Credits
☐ Jail or prison conditions
 ☐ Prison discipline
☐ Other (specify): _____

1. Your name: IDRIS NAWABI
2. Where are you incarcerated? CALIFORNIA MEN'S COLONY STATE PRISON
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

ROBBERY WITH USE OF A DEADLY WEAPON, SODOMY / THREAT OF RETALIATION
AND PENETRATION OF GENITAL WITH FOREIGN OBJECT.

- b. Penal or other code sections: PC 289, PC 286(C)(3), PC 211, PC 12022.3(a) and 12022(b).

- c. Name and location of sentencing or committing court: ALAMEDA COUNTY SUPERIOR COURT, 1225
FALLON STREET, #209, OAKLAND, CA 94612-4293.

- d. Case number: H-23388.

- e. Date convicted or committed: FEBRUARY 19, 1999.

- f. Date sentenced: APRIL 02, 1999.

- g. Length of sentence: 19 YEARS AND 4 MONTHS.

- h. When do you expect to be released? JUNE 07, 2013.

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

JULES BONJOUR, ATTORNEY AT LAW.

4. What was the LAST plea you entered? (check one)

☐ Not guilty ☐ Guilty ☒ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

IN LIGHT OF THE RECENT U.S. SUPREME COURT DECISION IN CUNNINGHAM
V. CALIFORNIA, THAT STRUCK DOWN THE CALIFORNIA'S DETERMINATE SENTENCING
LAW (DSL) BECAUSE IT'S UNCONSTITUTIONAL BY PLACING SENTENCE-ELEVATING
FACT-FINDING WITHIN THE JUDGE'S PROVINCE, VIOLATES A DEFENDANT'S RIGHT
TO TRIAL BY JURY SAFEGUARDED BY SIXTH AND FOURTEENTH AMENDMENTS.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what *time (when)* or *place (where)*. (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.) (ATTACHED)

ON APRIL 02, 1999, PETITIONER APPEARED BEFORE THE SENTENCING JUDGE
VERNON K. NAKAHARA WHO SENTENCED PETITIONER TO 19 YEARS AND 4 MONTHS
AS FOLLOWS: ON COUNT FOUR THAT IS VIOLATION OF SECTION 289, THE COURT
IMPOSED THE AGGRAVATED TERM OF EIGHT YEARS, THE AGGRAVATED TERM
WAS APPLIED BASED ON THE JUDGE'S FACT-FINDING AND SUBJECTIVE BELIEF. IN
CONSECUTIVE TO THE EIGHT YEARS IN COUNT FOUR THE COURT IMPOSED AN
ENHANCEMENT OF FOUR YEARS ON THE USE CLAUSE, TALLING 12 YEARS
ON COUNT FOUR ALONE. THEN, THE COURT IMPOSED A CONSECUTIVE OF SIX
YEARS ON COUNT FIVE FOR VIOLATION OF SECTION 286(b) THE COURT USED
THE MIDDLE TERM. THEN, ON COUNT TWO, THAT IS A VIOLATION OF SECTION
211 THE COURT IMPOSED ONE-THIRD THE MID TERM OF ONE YEAR TO RUN
CONSECUTIVE TO COUNT FOUR AND COUNT FIVE AND THE COURT IMPOSED
A CONSECUTIVE ENHANCEMENT OF FOUR MONTHS ON COUNT TWO FOR THE USE
CLAUSE. ***SEE ATTACHED TRANSCRIPT AND A.O.J.***

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

IN CUNNINGHAM, THE U.S. SUPREME COURT HELD THAT THE METHOD FOR IMPOSING
HIGH TERMS UNDER THE DETERMINATE SENTENCING LAW (DSL) VIOLATED
CRIMINAL DEFENDANTS' RIGHTS TO TRIAL BY JURY AND PROOF OF FACTS
BEYOND A REASONABLE DOUBT UNDER THE U.S. CONSTITUTION'S SIXTH AND -
CONTINUED ON ATTACHED PAGE FOUR OF SIX SECTION 6. SUPPORTING CASES

7. Ground 2 or Ground _____ (if applicable):

a. Supporting facts:

- b. Supporting cases, rules, or other authority: (CONTINUED FROM PAGE THREE OF SIX SECTION b. SUPPORTING CASES)
- FOURTEENTH AMENDMENTS. THE U.S. SUPREME OPINIONED THAT BECAUSE THE
MIDDLE TERM SENTENCE IS THE HIGHEST TERM THAT CAN BE IMPOSED
BASED ON THE JURY'S VERDICT ALONE, IT IS UNCONSTITUTIONAL TO ALLOW
A JUDGE TO IMPOSE A HIGH TERM SENTENCE BASED ON FACTS THAT WERE
NOT FOUND BY THE JURY TO BE TRUE BEYOND A REASONABLE DOUBT.
** CONTINUED ON ATTACHED SHEET **

~~Supporting cases~~

- b. Supporting cases, rules, or other authority: (CONTINUED FROM PAGE FOUR OF SIX SECTION b. SUPPORTING CASES)
- IN APPENDI V. NEW JERSEY, THE COURT HELD THAT, UNDER THE SIXTH AMENDMENT, ANY FACT (OTHER THAN A PRIOR CONVICTION) THAT EXPOSES A DEFENDANT TO A SENTENCE IN EXCESS OF THE RELEVANT STATUTORY MAXIMUM MUST BE FOUND BY A JURY, NOT A JUDGE, AND ESTABLISHED BEYOND A REASONABLE DOUBT, NOT MERELY BY A PREPONDERANCE OF THE EVIDENCE. SEE 530 U.S. 466, 490. THE MIDDLE TERM PRESCRIBED UNDER CALIFORNIA LAW, NOT THE UPPER TERM, IS THE RELEVANT STATUTORY MAXIMUM.

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☒ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

b. Result _____ c. Date of decision: _____

d. Case number or citation of opinion, if known: _____

e. Issues raised: (1) _____

(2) _____

(3) _____

f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☒ No. If yes, give the following information:

a. Result _____ b. Date of decision: _____

c. Case number or citation of opinion, if known: _____

d. Issues raised: (1) _____

(2) _____

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

AFTER, I WAS SENTENCED IN 1999, THE LAWS, CASE LAWS AND STATUTES THAT WERE
IN A EFFECT THEN, LEFT ME NO GROUNDS FOR APPEAL UNTIL THE U.S. SUPREME COURT
RULING ON MONDAY, JANUARY 22, 2007, CUNNINGHAM V. CALIFORNIA.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: ALAMEDA COUNTY SUPERIOR COURT.

(2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS PETITION.

(3) Issues raised: (a) CUNNINGHAM FORBIDS JUDGES FROM FINDING AGGRAVATING FACTS BASED ON THE NATURE OF THE CRIME, SUCH AS THAT A VICTIM WAS VULNERABLE, CRUELTY, ETC.

(b) IT IS UNCONSTITUTIONAL TO ALLOW A JUDGE TO IMPOSE THE UPPER TERM BASED ON FACTS THAT WERE NOT FOUND BY THE JURY TO BE TRUE BEYOND A REASONABLE DOUBT.

(4) Result (Attach order or explain why unavailable): DENIED WITH OPINION. OPINION UNAVAILABLE BECAUSE IT WAS SUBMITTED AS AN EXHIBIT TO FIRST DISTRICT COURT OF APPEAL.

(5) Date of decision: MARCH 28, 2007

b. (1) Name of court: FIRST DISTRICT COURT OF APPEAL

(2) Nature of proceeding: HABEAS CORPUS PETITION

(3) Issues raised: (a) THAT CALIFORNIA STATE COURTS SHOULD ALLOW BROADER RETROACTIVE APPLICATION OF THE APPENDI/BLAKELY/CUNNINGHAM DECISIONS.

(b) THE MIDDLE TERM SENTENCE IS THE HIGHEST TERM THAT CAN BE IMPOSED BASED ON THE JURY'S VERDICT ALONE, IT IS UNCONSTITUTIONAL TO ALLOW A JUDGE TO IMPOSE THE UPPER TERM.

(4) Result (Attach order or explain why unavailable): DENIED WITH NO OPINION. ("ORDER" ATTACHED)

(5) Date of decision: MAY 10, 2007

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

ALAMEDA COUNTY SUPERIOR COURT; DATE OF THE HEARING: MARCH 28, 2007; NATURE OF HEARING: HABEAS CORPUS PETITION TO REDUCE THE UPPER TERM TO MIDDLE TERM. DENIED.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

IN LIGHT OF THE RECENT U.S. SUPREME COURT RULING (JANUARY 22, 2007) THAT JURIES, NOT JUDGE'S, MUST DETERMINE FACTS THAT JUSTIFY HARSHER SENTENCES, THEREFORE I'M SEEKING RELIEF FROM THIS COURT TO REDUCE THE UPPER TERM IMPOSED BY THE JUDGE TO MIDDLE TERM.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:


17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I HAVE EXHAUSTED MY REMEDIES WITH THE LOWER COURTS, THEREFORE I'M SEEKING RELIEF FROM THIS COURT.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: June 26, 2007


(SIGNATURE OF PETITIONER)

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED

MAY 10 2007

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____
DEPUTY

In re INDRIS JAVIER NAWABI,
on Habeas Corpus.

A117491

(Alameda County
Super. Ct. No. H23388)

The Court:*

The petition for a writ of habeas corpus is denied.

Dated: MAY 10 2007

McGUINNESS, P.J.

P.J.

* McGuinness, P.J., Pollak, J., & Siggins, J.

P41591

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

[not valid without completed page two of CR-290 attached]

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA BRANCH OR JUDICIAL DISTRICT: Hayward Hall of Justice		ENDORSED FILED ALAMEDA COUNTY AUG 12 2003 CLERK OF THE SUPERIOR COURT P. DANIELS Deputy		
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: IDRIS JAVIER NAWABI	DOB: 01-15-76			H23388 -A
AKA:				-B
CI#: 10863792				-C
BOOKING INFORMATION: PFN: AWW161 CEN: 6202632		-D		
<input type="checkbox"/> NOT PRESENT <input checked="" type="checkbox"/> AMENDED ABSTRACT				
DATE OF HEARING 04-02-1999		JUDGE Vernon K. Nakahara		
DEPT. NO. 32		PROBATION NUMBER OR PROBATION OFFICER James Avery		
CLERK Tracy Wellenkamp		REPORTER Rafael Miller		
COUNSEL FOR PEOPLE <input checked="" type="checkbox"/> Deputy District Attorney <input type="checkbox"/> State Attorney General Martin Brown		COUNSEL FOR DEFENDANT <input type="checkbox"/> Deputy Public Defender <input checked="" type="checkbox"/> Private Counsel Jules & Michael Thorman, ESQ		

1. Defendant was convicted of the commission of the following felonies:

- ☐ Additional counts are listed on attachment
 (number of pages attached)

CNT.	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (Month/Date/Year)	Convicted by			Term (L, M, U)	Concurrent	Consecutive 1/3 Violent	Consecutive 1/3 NON Violent	Consecutive Full Term	Incomplete sentence (refer to item 5)	654 Stay	Principal or Consecutive Time Imposed	
						JURY	COURT	PLEA								YRS.	MOS.
4	PC	289	PEN/GENITAL/ANAL W/ FOREIGN OBJ	1996	02-19-99			X	u							8	0
5	PC	286(c)(3)	SODOMY /THREAT OF RETALIATION	1996	02-19-99			X	M				X			6	0
2	PC	211*	ROBBERY - 1 st DEGREE	1996	02-19-99			X	M		X					1	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

CNT.	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL
4	12022.3(a)	4	12022(b)	4 mo					4 4

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series).

List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. ☐ Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes).

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:

7. ☐ Additional indeterminate term (see CR-292).

8. TOTAL TIME excluding county jail term: 19 5

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

LE OF THE STATE OF CALIFORNIA vs.
 DEFENDANT: **IDRIS JAVIER NAWABI**

H23388 -A

-B

-C

-D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

a. Restitution Fines(s):

Case A: \$10,000.00	per PC 1202.4(b) forthwith per PC 2085.5;	\$10,000.00	per PC 1202.45 suspended unless parole is revoked.
Case B: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
Case C: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.
Case D: \$	per PC 1202.4(b) forthwith per PC 2085.5;	\$	per PC 1202.45 suspended unless parole is revoked.

b. Restitution per PC 1202.4(f):

Case A: \$	<input type="checkbox"/> Amount to be determined to:	<input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case B: \$	<input type="checkbox"/> Amount to be determined to:	<input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case C: \$	<input type="checkbox"/> Amount to be determined to:	<input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund
Case D: \$	<input type="checkbox"/> Amount to be determined to:	<input type="checkbox"/> victim(s)*	<input type="checkbox"/> Restitution Fund

(*List victim name(s) if known and amount breakdown in item 11, below.)

c. Fine(s):

Case A: \$	per PC 1202.5. \$	per VC 23550 or: days	<input type="checkbox"/> county jail	<input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> CC	<input type="checkbox"/> CS
Case B: \$	per PC 1202.5. \$	per VC 23550 or: days	<input type="checkbox"/> county jail	<input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> CC	<input type="checkbox"/> CS
Case C: \$	per PC 1202.5. \$	per VC 23550 or: days	<input type="checkbox"/> county jail	<input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> CC	<input type="checkbox"/> CS
Case D: \$	per PC 1202.5. \$	per VC 23550 or: days	<input type="checkbox"/> county jail	<input type="checkbox"/> prison in lieu of fine	<input type="checkbox"/> CC	<input type="checkbox"/> CS

d. Lab Fee and Drug Program Fee:

Case A: Lab Fee: \$	per HS 11372.5(a) for counts	<input type="checkbox"/> Drug Program Fee of \$150 per HS 11372.7(a).
Case B: Lab Fee: \$	per HS 11372.5(a) for counts	<input type="checkbox"/> Drug Program Fee of \$150 per HS 11372.7(a).
Case C: Lab Fee: \$	per HS 11372.5(a) for counts	<input type="checkbox"/> Drug Program Fee of \$150 per HS 11372.7(a).
Case D: Lab Fee: \$	per HS 11372.5(a) for counts	<input type="checkbox"/> Drug Program Fee of \$150 per HS 11372.7(a).

10. TESTING

a. ☐ AIDS pursuant to PC 1202.1 b. ☐ DNA pursuant to PC 296 c. ☐ other (specify):

11. Other orders (specify):

12. EXECUTION OF SENTENCE IMPOSED

a. ☒ at initial sentencing hearing. d. ☐ at resentencing per recall of commitment. (PC 1170(d).)

b. ☐ at resentencing per decision on appeal. e. ☐ other (specify):

c. ☐ after revocation of probation.

13. CREDIT FOR TIME SERVED

Case A: Total Credits: 969	Actual: 842	Local Conduct: 127	<input type="checkbox"/> 4019	<input checked="" type="checkbox"/> 2933.1
Case B: Total Credits:	Actual:	Local Conduct:	<input type="checkbox"/> 4019	<input type="checkbox"/> 2933.1
Case C: Total Credits:	Actual:	Local Conduct:	<input type="checkbox"/> 4019	<input type="checkbox"/> 2933.1
Case D: Total Credits:	Actual:	Local Conduct:	<input type="checkbox"/> 4019	<input type="checkbox"/> 2933.1

DATE SENTENCE PRONOUNCED:
04-02-1999

TIME SERVED IN STATE INSTITUTION:
☐ DMH

☐ CDC

☐ CRC

14. Defendant is remanded to the custody of the Sheriff: ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
 To be delivered to: ☒ reception center designated by Director, California Department of Corrections: ☒ San Quentin ☐ Chowchilla
☐ Other (specify):

CLERK OF THE COURT

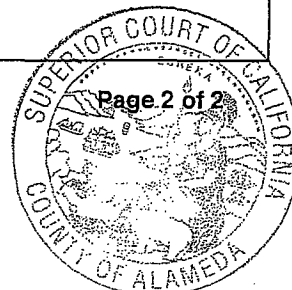
I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

PATRICIA DANIELS

DATE

08-12-03



ENDORSED

FILED

ALAMEDA COUNTY

1

AUG 18 2003

CLERK OF THE SUPERIOR COURT

By MARILYN SAGE

Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE GARY M. PICETTI, JUDGE

DEPARTMENT NO. 513

THE PEOPLE OF THE STATE
OF CALIFORNIA,

No. H23388

Plaintiff,

vs.

IDRIS JAVIER NAWABI,

Defendant.

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS ON SENTENCE-STATE PRISON COMMITMENT

HAYWARD HALL OF JUSTICE
HAYWARD, CALIFORNIA

(FRIDAY, AUGUST 8, 2003)

APPEARANCES:

For the People:

CHRIS LAMIERO

Deputy District Attorney

For the Defendant:

JULES BONJOUR

Attorney at Law

Reported by: Brenda A. Scott, CSR #6336

1 FRIDAY, AUGUST 8, 2003, 11:44 A.M.

2 PROCEEDINGS

3 ---oOo---

4
5 MR. BONJOUR: Good morning. Could we call line 13
6 on the 9:05 calendar, and can Mr. Lamiero and I approach on
7 that?

8 (Off-the-record discussion at the bench.)

9 THE COURT: All right. Calling the matter of
10 People versus Idris Javier Nawabi.

11 Counsel state their appearances, please.

12 MR. BONJOUR: Yes. Good morning. Jules Bonjour
13 for Mr. Nawabi. He's not present. He's in custody in state
14 prison.

15 MR. LAMIERO: Chris Lamiero for the People.

16 MR. BONJOUR: I asked the matter be put on calendar
17 to be -- to correct the Abstract of Judgment that was
18 sentenced to state prison indicating that Mr. Nawabi was
19 convicted of 286(c), sex with a minor, a person under the age
20 of 14.

21 I've shown I hope to the Court's satisfaction and,
22 in fact, he pled to Count 5 of the Information which was
23 sodomy by threat or retaliation. The victim in this case all
24 parties will agree was 57 years old. The offense was serious.
25 The mischaracterization of the offense is causing problems
26 for Mr. Nawabi as the Court might understand.

27 I'm asking that the Abstract of Judgment be amended
28 to show that he was convicted of an -- an offense, 286(c)(3),

1 sodomy by threat of retaliation, and that that corrected
2 Abstract be sent to the Department of Corrections.

3 THE COURT: All right. So we're still talking
4 about Count 5. We're just changing the offense and the
5 description of the offense, am I correct?

6 MR. BONJOUR: Yes.

7 THE COURT: That seems to be consistent with the
8 Abstract or, excuse me, with the transcript of the plea and
9 the Information just pled to. So your motion to amend the
10 Abstract of Judgment to reflect -- instead of 286 of the Penal
11 Code to reflect 286(c)(3). Are those both parens?

12 MR. BONJOUR: Yes. Paren small C and paren 3.

13 THE COURT: Okay. And we'll also amend the
14 description of the crime to be sodomy by threat or
15 retaliation. Otherwise, the new Abstract of Judgment will be
16 exactly the same.

17 The sentencing and everything imposed are all
18 correct, is that right?

19 MR. BONJOUR: That is correct.

20 THE COURT: All right, so ordered.

21 MR. BONJOUR: Thank you.

22 THE COURT: The main thing is that we make that
23 change on Count 5, 286 with small C and a 3 in parens, and
24 that we just change the definition.

25 THE CLERK: Okay.

26 THE COURT: Here it shows sodomy with a person 14
27 which is incorrect. Now it will show sodomy by threat or
28 retaliation. Otherwise everything else is exactly the same.

1 MR. BONJOUR: Can you give me the best estimate,
2 how long will that take to get sent off to the Department of
3 Corrections?

4 THE CLERK: When that goes down today, I don't know
5 how soon. I can write urgent on it to make sure it gets
6 priority.

7 MR. BONJOUR: Thanks very much.

8
9 (Proceedings concluded at 11:50 a.m.)

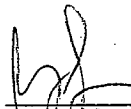
10 ---o0o---

1
2
3 State of California)
4) ss.
5 County of Alameda)
6
7
8

9 I, Brenda A. Scott, Official Court Reporter of the
10 Superior Court, County of Alameda, State of California, do
11 hereby certify that the foregoing transcript in the matter of
12 **People vs. Nawabi** comprise a full, true and accurate
13 transcript of the proceedings had in the within entitled
14 matter, recorded by me by computer-assisted stenotype at the
15 time and place therein stated.

16 In compliance with Section 8016 of the Business and
17 Professions Code, I certify under penalty of perjury that I am
18 a Certified Shorthand Reporter with license number 6336 in
19 full force and effect.

20 Witness my hand this 12th day of August, 2003.
21

22 
23 _____
24 Brenda A. Scott,
25 Certified Shorthand Reporter
26
27
28

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE VERNON NAKAHARA

DEPARTMENT NO. 32

--oOo--

6-18-99
FILED

APR 27 1999

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

No. H23388

IDRIS JAVIER NAWABI,

Defendant.

COPY

REPORTER'S TRANSCRIPT OF

The foregoing instrument is a true and correct copy of the original on file in this office.

ATTEST:

FRIDAY, APRIL 2, 1999

--oOo--

APR 29 1999

HAYWARD HALL OF JUSTICE

Ronald G. Overholt, Clerk of the Superior Court of California, County of Alameda

By: *[Signature]* Deputy

--oOo--

A P P E A R A N C E S

For the People: THOMAS J. ORLOFF, District Attorney
BY: MARTIN BROWN, Deputy

For the Defendant: JULES BONJOUR, Attorney

Reported by: RACHAEL A. MILLER
CSR NO. 11099

RACHAEL A. MILLER, CSR NO. 11099

FRIDAY, APRIL 2, 1999

- - 000 - -

The matter of the People of the State of California versus IDRIS NAWABI, Defendant, Case Number H23388, came on regularly before the Honorable VERNON NAKAHARA, Judge of the Superior Court of the State of California, for the County of Alameda, Department Number 32.

The People were represented by MARTIN BROWN, Deputy District Attorney.

The Defendant, IDRIS NAWABI, was present and represented by JULES BONJOUR, Esquire.

The following proceedings were then had:

- - 0.00 - -

THE COURT: Idris Nawabi.

MR. BONJOUR: That matter's ready. Jules
Bonjour appearing on behalf of Mr. Nawabi.

THE COURT: I need to -- Mr. Bonjour, I need to get one thing in chambers.

Okay. This matter's on for sentencing. Waive formal reading, arraignment?

MR. BONJOUR: Yes, Your Honor.

THE COURT: Any legal cause?

MR. BONJOUR: No.

THE COURT: For the record, let me indicate that --

MR. BONJOUR: I would like to address the Court, however, before you do impose sentence.

THE COURT: Right. For the record then I have

1 read and considered the lengthy probation report in this
2 matter.

3 I have read and considered all the materials that
4 have been submitted by Mr. Bonjour, including the report
5 by Dr. Wornian, which is a very lengthy report. I've read
6 the transcript on the change of plea, and I also have
7 the -- the letter by Ms. Ryals, who is his previous
8 attorney, the letter from the Nawabi family, the probation
9 report I said, and also the two-page letter from the
10 victim in this matter that Ms. Elaine Lopes from the
11 Victim-Witness Program has submitted to the Court..

12 Those are the items that I have considered in this
13 particular case. Mr. Brown or Mr. Bonjour, is there
14 anything further?

15 MR. BONJOUR: There's one additional document,
16 Your Honor, that I didn't give to the Court. It's a short
17 note, but it's signed by many members of the Afghan
18 community expressing their support for Mr. Nawabi.

19 THE COURT: Mr. Brown.

20 MR. BROWN: I have nothing to submit to the
21 Court.

22 THE COURT: Do you want to see this?

23 MR. BROWN: No. That's fine.

24 THE COURT: Okay. Any further comments?

25 MR. BONJOUR: Yes, Your Honor. Yesterday
26 afternoon, Mr. Powell at the probation department faxed to
27 me a copy of his report, and attached to that report was
28 the two-page letter from the victim in this case.

1 It was a powerful reminder of what a terrible crime
2 this is, and I must say it took me a few minutes to
3 recover from an emotional impact that it had on me. Then
4 I re-read Dr. Wornian's report, and what I felt after
5 reading that was that while this was a terrible crime, it
6 was not committed by a terrible person, but committed by a
7 person who had experienced a terrible life.

8 I think we're all the product of our experiences as
9 children and as young adults. And if a child is subjected
10 to physical abuse, sexual abuse, watching his mother
11 abused in his presence, dislocated from his home by a
12 terrible war, and then transported to a foreign country
13 and left to his own devices, deals with his pain by the
14 use of drugs, it's a way of understanding how all of this
15 anger that he had was one terrible night directed at a
16 totally innocent person.

17 Dr. Wornian observed, and I'll quote from the
18 report, "His has been a world in which violence appears to
19 have been an almost routine and taken for granted feature
20 of everyday life. He has, not surprisingly, adapted to
21 the demands of this world by becoming prone to engaging in
22 acts of violence himself."

23 He then gave Idris a number of tests, and those
24 tests revealed a person who is suffering from probable
25 brain impairment. The measure of his intellectual
26 functioning was within the mentally retarded range, and
27 concluded he manifested signs of the post-traumatic stress
28 disorder.

1 Dr. Wornian concluded by saying Mr. Nawabi needs to
2 be placed in a well structured and well supervised for the
3 living situation, in quote. Dr. Wornian recommends this
4 facility be one where Mr. Nawabi can receive treatment for
5 both his post-traumatic and his substance abuse.

6 And the issue before the Court this morning is how
7 long should that period and that structured setting be. I
8 would like the Court to consider, in addition to Dr.
9 Wornian's report, the fact that Idris was 20 years old at
10 the time he committed this offense; that his prior record
11 was insubstantial, consisting of 22 misdemeanors and a
12 number of traffic violations, and that he has undergone a
13 transformation while in custody during the last year, in
14 large part, I think, because of the fact he's been drug
15 free and he has established reunification with his family;
16 that is his mother and his sisters, and his brother, and
17 he finally realized that rather than being ostracized from
18 the family, being excluded from the family, they truly
19 love him, and they want him to be a member of the family.

20 The Court indicated that you would be sentencing Mr.
21 Nawabi to no more than 19 years and four months. I would
22 ask the Court to consider a sentence of 13 years as
23 follows: On Count Four, the principal term, the mid term
24 of six years, plus four years on the use of the knife,
25 which is the mid term of the use enhancement; on Count
26 Five, three years, the mitigated term consecutive; and on
27 Count Two, three years plus one year for the knife,
28 imposition of sentence suspended.

1 I believe that those 13 years combined with the fact
2 that at time of the plea I voir dired Mr. Nawabi on the
3 fact that he was pleading to an aggravated felony for the
4 purposes of immigration and naturalization and it
5 undoubtedly at the completion of his prison sentence he
6 would be deported that the 13 years combined with the
7 deportation is a significant sentence and punishment that
8 both reflects what Mr. Nawabi did.

9 I hope this also offers some protection and
10 assurance for the victim who certainly underwent a
11 terrible experience, and in the end would satisfy what I
12 hope we're all here to achieve and that is some form of
13 justice.

14 There's a large contingency of the Nawabi family
15 here in court, and his sister would ask the Court
16 permission to speak for just two minutes, three minutes,
17 so she can express her feelings.

18 THE COURT: All right. Please, first of all,
19 state your name for the record.

20 MS. NAWABI: My name is Jasmine Nawabi. I'm
21 Idris' sister.

22 THE COURT: Make sure you speak up also.

23 MS. NAWABI: I'm speaking for my family, my
24 brother and myself, and what I'm about to say is coming
25 straight from my heart. And I believe my brother should
26 be given a second chance, because ever since I've known
27 him he's lived an agonizing life, and that shouldn't be
28 the excuse for what he's done, for what crime he's

1 committed, but, Your Honor, consider that he hasn't had
2 much of a life.

3 It's a painful, sad life, and you can't put him away
4 for having this life, you know. I mean, I -- I know I
5 feel sympathy for the victim, but you can't put him away
6 for half his life, because he deserves a second chance.
7 He's a changed person. In the letters he writes, when we
8 go to visit him, to tell that he's changed.

9 I just -- I'm just asking for your Court to have
10 some mercy on my brother. Thank you.

11 THE COURT: Thank you.

12 MR. BONJOUR: Thank you, Your Honor.

13 THE COURT: All right. Mr. Brown, anything
14 further?

15 MR. BROWN: Well, Your Honor, I want to speak a
16 few moments for the victim in this case. You know, the
17 defendant may have had a very sad and unfortunate life,
18 but he went out and hunted and found the victim in this
19 case.

20 He broke into her residence and for three hours
21 terrorized her and did unspeakable things to her. These
22 are things that she will never recover from. These are
23 traumas she will live with the rest of her life.

24 I do not believe in jailhouse transformation. I
25 believe the Court should impose the maximum sentence of 19
26 years, four months based on the harm that was done to the
27 victim in this case and because of all the factors that
28 Wornian refers to. I believe they show the defendant to

1 be a continuing danger and member to society, so I would
2 ask the Court to impose 19 years, four months.

3 MR. BONJOUR: Just a brief comment. He did not
4 hunt out the victim. This was a crime of opportunity. He
5 thought the residence was unoccupied. Unfortunately, it
6 was not unoccupied. He did not hunt her or seek her out.

7 THE COURT: Okay. Let me see the attorneys up
8 here just for a moment.

9 (Whereupon a discussion was held at the bench.)

10 THE COURT: Okay. Then back on the record.
11 The Court has, as I indicated, read and considered all of
12 those matters, including what has been presented here this
13 morning, and I am ready to sentence Mr. Nawabi, unless
14 there's anything further. Mr. Brown?

15 MR. BROWN: Submitted.

16 THE COURT: Mr. Bonjour?

17 MR. BONJOUR: Submitted.

18 THE COURT: Matter being submitted, it is the
19 sentence and judgment of this Court as follows: And that
20 is, with respect to Count Four, Madam clerk, that is a
21 violation of Section 289, the Court is going to use the
22 aggravated term of eight years in state prison. The
23 aggravation is because the crime involved great violence,
24 great bodily injury, a high degree of cruelty and
25 viciousness.

26 With respect to the use clause, the Court is using
27 the mid term of four years. That is the use clause as to
28 Count Four. That will be the mid term of four years. So

1 on Count Four, Madam clerk, that will be 12 years in state
2 prison.

3 With respect to Count Five, the Court -- that's a
4 violation of Section 286(C), the Court is going to use the
5 mid term of six years. That six years in Count Five is to
6 run consecutive to the 12 years in Count Four. With
7 respect to the Count Two, that is a violation of Section
8 211. The Court is going to use the mitigated term on the
9 211 of three years. One-third the mid term -- one-third
10 of that would be one year, and then the use clause as to
11 Count Two, Madam clerk, that would be four months.

12 So on Count Two, that would be a total of one year,
13 four months. That one year, four months is to run
14 consecutive to the six years in Count Five, to the four
15 years in -- I'm sorry -- to the 12 years in Count Four.

16 That will be a total of 19 years, four months, and
17 that will be served at 85 percent.

18 MR. BROWN: Your Honor, as to Count Two, the
19 211, I believe three years is the middle term.

20 THE COURT: No. I think -- do you show that as
21 the mid? I show it is --

22 MR. BROWN: Two, three, four. Two, three,
23 five.

24 THE COURT: I show it is a four, five, six.

25 MR. BROWN: Is it charged 211?

26 THE COURT: First.

27 MR. BONJOUR: Yeah.

28 MR. BROWN: Okay. All right.

1 THE COURT: All right. So that will be 19
2 years, four months in state prison. He has how many
3 actual?

4 THE BAILIFF: 842 actual.

5 THE COURT: I'm sorry.

6 THE BAILIFF: 842 actual, plus 127 Sage for a
7 total of 969 dates credit for time served. That's at 85
8 percent.

9 THE COURT: That's at 85 percent. The Court
10 will also assess a restitution fund fine in the amount of
11 \$10,000. There will be a similar parole revocation fund
12 fine of \$10,000 that will be suspended.

13 He is remanded into the custody of the sheriff's
14 department to be delivered to the Department of
15 Corrections for the service of the sentence.

16 And, Mr. Nawabi, it is one of the -- I did read all
17 of the stuff concerning your particular background, and
18 frankly, I agree with Mr. Bonjour is that your life has
19 been one of hell.

20 On the other hand, I think that on this particular
21 occasion, hell started for your particular victim. And
22 I've considered all of the materials submitted to me, and
23 I believe that is a fair and just sentence in this case.

24 Anything further?

25 MR. BONJOUR: No, Your Honor.

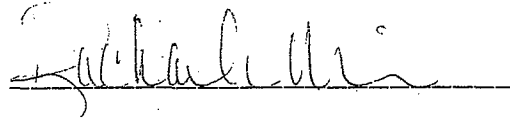
26 MR. BROWN: No.

27 THE COURT: All right. That will be the
28 order.

1 CERTIFICATE OF OFFICIAL SHORTHAND REPORTER PRO TEM
2 STATE OF CALIFORNIA)
3 COUNTY OF ALAMEDA)
4

5 I, Rachael A. Miller, hereby certify that I am a
6 Certified Shorthand Reporter, and that I recorded verbatim
7 in stenograph the proceedings had Friday, April 2, 1999,
8 in the matter of the People of the State of California vs.
9 IDRIS NAWABI, Case Number H23388 fully and accurately, to
10 the best of my skill and ability; that I have caused my
11 stenotype notes to be transcribed into typewriting, and
12 the foregoing 10 pages constitute a complete and accurate
13 transcript of said stenotype notes taken at the
14 above-mentioned proceedings.
15
16

17 Dated: April 6, 1999
18
19
20
21



22 RACHAEL A. MILLER
23 CSR License No. 11099
24
25
26
27
28

EXHIBIT 6

S154884

IN THE SUPREME COURT OF CALIFORNIA

En Banc


In re IDRIS NAWABI on Habeas Corpus

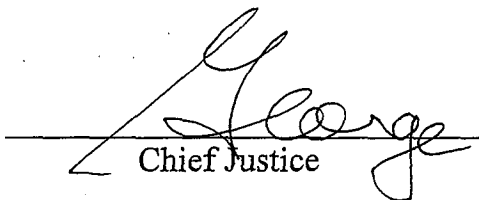
The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

JAN 16 2008

Frederick K. Ohlrich Clerk


Deputy


Chief Justice